

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	
	)	
TracFone Wireless, Inc.	)	
	)	
Petition for Designation as an	)	
Eligible Telecommunications Carrier	)	
In the State of North Carolina	)	
	)	
Petition for Designation as an	)	
Eligible Telecommunications Carrier	)	
In the State of Alabama	)	
	)	
Petition for Designation as an	)	
Eligible Telecommunications Carrier	)	
In the State of Tennessee	)	

**Comments of TCA, Inc. – Telcom Consulting Associates**

**I. Introduction**

TCA, Inc. – Telcom Consulting Associates (TCA) files these comments in response to the Commission’s request.<sup>1</sup> At issue are three petitions filed by TracFone Wireless, Inc. (TracFone) for designation as an Eligible Telecommunications Carrier (ETC) throughout the states of North Carolina,<sup>2</sup> Alabama<sup>3</sup> and Tennessee.<sup>4</sup> TCA strongly urges the Commission to swiftly deny all three petitions filed by TracFone.

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<sup>1</sup> Public Notice, *Parties are Invited to Comment on TracFone Wireless’ Petitions for Designation as an Eligible Telecommunications Carrier in the North Carolina, Alabama and Tennessee*, CC Docket 96-45, DA 04-3984, rel. December 20, 2004.

<sup>2</sup> In the Matter of Federal-State Joint Board on Universal Service, TracFone Wireless, Inc., *Petition for Designation as an Eligible Telecommunications Carrier in the State of North Carolina*, CC Docket 96-45, (filed November 9, 2004) (North Carolina Petition).

TCA is a management consulting firm providing financial, regulatory, management and marketing services for over eighty small, rural local exchange carriers (“LECs”) throughout the United States. TCA’s clients, including LECs serving in the states of Alabama and North Carolina, receive support from federal universal service support mechanisms, based on specific rules and regulations and will be directly impacted by the decisions made by this Commission. These comments address the concerns of TCA’s clients.

## **II. The FCC’s original decision to deny ETC status to resellers is correct and should stand.**

TracFone requests ETC status in part based on its assumption that this Commission will grant its Petition for Forebearance.<sup>5</sup> TracFone filed this Petition June 8, 2004, requesting forbearance from Section 214,<sup>6</sup> which states that ETCs must offer supported services only by “either using its own facilities or a combination of its own facilities and resale of another carrier’s service.”<sup>7</sup> In its 1997 Report and Order establishing the rules TracFone now seeks to escape, the FCC stated, “if pure resellers could be designated eligible carriers and were entitled to receive support for providing resold services, they in essence, would receive a double recovery of universal service support...”<sup>8</sup> TracFone, however, states that enforcement of Section 214 “is not necessary to ensure that [it’s] charges and practices are just and reasonable and are not unjustly or unreasonably discriminatory; is not necessary to protect consumers; and is consistent with the public interest.”<sup>9</sup> TracFone simply states that forbearing from applying Section 214 “is consistent with the public interest.”<sup>10</sup> However, in no way, does it prove or even imply how the current wireless reseller market differs from 1997 when the Commission concluded, “that it is

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<sup>3</sup> In the Matter of Federal-State Joint Board on Universal Service, TracFone Wireless, Inc., *Petition for Designation as an Eligible Telecommunications Carrier in the State of Alabama*, CC Docket 96-45, (filed November 9, 2004) (Alabama Petition).

<sup>4</sup> In the Matter of Federal-State Joint Board on Universal Service, TracFone Wireless, Inc., *Petition for Designation as an Eligible Telecommunications Carrier in the State of Tennessee*, CC Docket 96-45, (filed November 9, 2004) (Tennessee Petition).

<sup>5</sup> In the Matter of Federal-State Joint Board on Universal Service, *Petition for Forebearance*, CC Docket No. 96-45, (filed June 8, 2004) (Petition for Forebearance).

<sup>6</sup> Tennessee Petition, p. 5.

<sup>7</sup> 47 U.S.C. § 214(e)(1)(A).

<sup>8</sup> In the Matter of Federal-State Joint Board on Universal Service, *Report and Order*, FCC 97-157, CC Docket No. 96-45, para. 179 (rel. May 8, 1997) (1997 Report and Order)

<sup>9</sup> North Carolina Petition, p. 6.

<sup>10</sup> *Ibid.*

neither in the public interest nor would it promote competitive market conditions to allow resellers to receive a double recovery.”<sup>11</sup>

Attempting an end run around both the law and this Commission’s rules, TracFone now claims that it “will solely use [ETC] designation and *the accompanying federal universal service funds* to offer Lifeline service...”<sup>12</sup> TracFone continues by stating that it “does *not* seek access to funds from the universal service fund to support service to high cost areas.”<sup>13</sup> However, attached to all three petitions are two sworn statements made by the President and Chief Executive Officer of TracFone, F. J. Pollack. These conflicting statements only confuse TracFone’s true intent regarding what type of federal universal service support it desires. Exhibit 3 to the Petitions is a copy of a certification filed with the Commission and the Universal Service Administrative Company (USAC).<sup>14</sup> In it, Mr. Pollak certifies that “all *high-cost support* provided to TracFone will be used only for the provision, maintenance and upgrading of facilities and services for which the support is intended...”<sup>15</sup> In another sworn statement, also attached to TracFone’s Petition for ETC Designation, Mr. Pollak certifies that “the information contained therein [is] true and correct to the best of my present knowledge.”<sup>16</sup> Mr. Pollack is, of course, referring to the information found in the Petitions for ETC Designation, the petitions that communicate TracFone’s desire for only low income support. Given these two conflicting sworn statements, what is the Commission, and the public it represents, to believe?

If TracFone’s Petitions for ETC Designation were granted, there continues to be the very real possibility that TracFone would receive double recovery of universal service support, especially as the Commission has only conflicting statements from TracFone regarding what type of federal universal service support it seeks. Regardless of which TracFone certification the Commission chooses to believe, neither its Petition for Forebearance nor any of its Petitions for ETC

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<sup>11</sup> 1997 Report and Order, para. 179.

<sup>12</sup> Alabama Petition, p. 1 (emphasis added). TracFone also makes this claim in both the North Carolina Petition (p. 1) and the Tennessee Petition (p. 1).

<sup>13</sup> *Ibid.* (emphasis added).

<sup>14</sup> See Exhibit 3 to all three instant petitions.

<sup>15</sup> North Carolina Petition, Exhibit 3 (emphasis added). See also, Alabama Petition, Exhibit 3 and Tennessee Petition, Exhibit 3.

<sup>16</sup> North Carolina Petition, Exhibit 1. See also, Alabama Petition, Exhibit 1 and Tennessee Petition, Exhibit 1.

Designation<sup>17</sup> have proven why the Commission was incorrect in 1997. Even taking into account the claim that TracFone now makes, that it only wishes for low income support, the Commission is afforded no guarantee that the potential for double recovery it noted in 1997 would not now be present. TCA is unaware that the Commission allows ETCs to choose which type of federal universal service support is received. Therefore, unless the Commission changes its rules and allows TracFone, and other qualifying ETCs, to only receive funds from the low income portion of the universal service fund, granting TracFone ETC status does allow TracFone access to all portions – low income and high-cost -- of the federal fund. The potential for double recovery is very real. TracFone's Petition for Forebearance, and all Petitions for ETC Designation, including the three instant Petitions, should be summarily and wholly denied.

### **III. TracFone's Petitions for ETC Designation continue to be fatally deficient.**

TracFone's Petitions for ETC Designation are fatally flawed and must be denied. Without comprehensive changes to its business model, TracFone cannot offer to its customers Lifeline and Link-Up, as it states it will,<sup>18</sup> and, as an ETC, it must. TracFone cannot, with any certainty, prove that its receipt of ETC status is in the public interest and even though it is requesting ETC status for two federally-recognized tribal land areas, TracFone's application is incomplete as to additional requirements imposed when seeking ETC status on tribal lands.

#### **A. As an ETC, TracFone must offer Lifeline and Link-up discounts; Under its current business model and this Commission's rules, TracFone cannot.**

TracFone states, its entire business model is predicated on selling consumers prepaid wireless services with no contracts, no credit checks and *no bills*.<sup>19</sup> Consumers need not ever contact TracFone in order to use its service.

TracFone's business model offers convenience to consumers; unfortunately, it is this very convenience that dooms its ETC applications. As is required of all ETCs, TracFone must offer

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<sup>17</sup> TracFone has earlier requested all types of federal universal service support available to ETCs. See, for example, In the Matter of Federal-State Joint Board on Universal Service, TracFone Wireless, Inc., *Petition for Designation as an Eligible Telecommunications Carrier in the State of New York*, CC Docket 96-45, (filed June 7, 2004).

<sup>18</sup> Tennessee Petition, p. 3.

<sup>19</sup> See, in general, all three instant Petitions for ETC Designation. See also, TracFone Petition for Forebearance, p. 3 ("In fact, there are no customer bills.")

the low-income programs, Lifeline and Link-Up. As previously noted, TracFone does commit to offer these programs. However, without changes to its business model, TracFone customers cannot qualify for either Lifeline or Link-Up.

USAC states that for both Lifeline and Link-Up, “[t]he telephone service address must be the participant's primary residence.”<sup>20</sup> Further, it must be the named subscriber that qualifies to participate in either Lifeline or Link-Up.<sup>21</sup> As detailed above, TracFone has no current way of knowing its customers’ primary residence or whether the named subscriber qualifies for low income participation. If the Commission were to grant TracFone’s request, under its current business model, there would no way to even minimize the possibility for abuse of these two valuable programs. As TracFone submits no details as to how it will offer these programs to qualifying customers, or even track its customers’ service address, the FCC must deny TracFone’s applications for ETC status.

Further, TracFone, in these three Petitions, does not provide to either the Commission or the public any idea of how it will offer Lifeline and Link-Up. TracFone admits that it is currently “developing a Lifeline service plan”<sup>22</sup> and “considering various alternatives.”<sup>23</sup> While giving no timeline of when such a fundamental decision will be made, or even whether the Commission will be made aware of the service plan, TracFone continues to urge the Commission to sign over a blank check for TracFone to fill in the details at a later time.

**B. TracFone fails in meeting its burden of proof in determining whether the public interest will be served.**

At the beginning of 2004, the Commission concluded that “[i]n determining whether the public interest is served, [we] place the burden of proof upon the ETC applicant,”<sup>24</sup> as well as, when

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<sup>20</sup> See <http://www.universalservice.org/li/components/linkup.asp> and <http://www.universalservice.org/li/components/lifeline.asp>.

<sup>21</sup> *Ibid.*

<sup>22</sup> Tennessee Petition, p. 3.

<sup>23</sup> *Ibid.*

<sup>24</sup> See In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, *Memorandum Opinion and Order*, FCC 03-338, CC Docket 96-45 (adopt. December 31, 2003) (rel. January 22, 2004), para. 26 (Virginia Cellular Order).

considering whether an ETC designation in rural study areas is in the public interest, the benefits and costs of an additional ETC must be weighed.<sup>25</sup> This Commission clearly stated, “that this balancing of benefits and costs is a *fact-specific* exercise.”<sup>26</sup> Therefore, in the instant proceedings, TracFone has the burden of *proving* that it is in the public interest for it to be designated an ETC. However, TracFone offers no proof or facts, but merely assertions and allegations upon which it seemingly expects the Commission to grant it access to the federal universal service funds.

TracFone begins by correctly stating that the Lifeline program is underutilized. It then claims that even though it “does not know why a program so important to low income consumers is so underutilized,”<sup>27</sup> it *expects* that through its advertising of its Lifeline service (a service that even TracFone cannot yet define), “the level of participation by eligible households in the Lifeline program will increase, and, thus, serve the public interest.”<sup>28</sup> TracFone does not detail for the Commission why its advertising is superior or would reach a broader base. It offers nothing to the Commission except expectations in order to meet its burden of proof.

TracFone then claims that granting it ETC status would serve the public interest with “the benefits of competitive choice.”<sup>29</sup> It then generalizes, in all three Petitions, that “some residences located in rural communities do not have access to the public switched network through the incumbent local exchange carrier.”<sup>30</sup> However, again, TracFone offers no proof as to how many of rural residences in the three states do not have access to the Public Switched Telephone Network (PSTN). Nor, does TracFone substantiate how granting it ETC status would increase the availability of the PSTN.

TracFone cannot authenticate this claim, because, as it admits, there are no bills within the TracFone business model. TracFone sells its services at over 60,000 retailers nationwide.<sup>31</sup> After TracFone ships its handsets to the 60,000 retailers, it has no way of knowing where those

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<sup>25</sup> Virginia Cellular Order, para. 28.

<sup>26</sup> *Ibid.* (emphasis added).

<sup>27</sup> Tennessee Petition, p. 11.

<sup>28</sup> *Ibid.*

<sup>29</sup> Tennessee Petition, P. 13.

<sup>30</sup> Tennessee Petition, p. 13. See also, Alabama Petition, p. 13 and North Carolina Petition, p. 13.

phones are being used, nor can it identify how many are primarily being used in the rural areas of Alabama, North Carolina and Tennessee. Theoretically, a customer could purchase a TracFone product in Washington, D.C. and use it in Nashville or a customer could purchase a TracFone product in Double Shoals, North Carolina and use it in Boston. The fact, whether TracFone acknowledges it or not, remains that granting TracFone ETC status provides no guarantee of any increase in access to the PSTN.

TracFone has not even begun meeting its burden of proof placed upon it, as an ETC applicant, by this Commission. TracFone must not be allowed to attempt an end-run around this rule, as well. The Commission should enforce its Virginia Cellular Order by summarily denying TracFone ETC designation requests.

**C. Even though TracFone's application requests ETC status in two federally-recognized tribal lands areas, it fails to prove important jurisdictional questions.**

TracFone requests ETC status throughout North Carolina and Alabama.<sup>32</sup> Contained within both states are tribal land areas recognized by the federal government – North Carolina is home to the Eastern Band of Cherokee Indians of North Carolina and Alabama contains the lands of the Poarch Band of Creek Indians of Alabama. The FCC has established specific requirements for requesting ETC status on tribal lands,<sup>33</sup> yet, TracFone makes no attempt to fulfill these requirements.

In 2000, the FCC determined that “carriers seeking an eligibility designation from this Commission for the provision of service on tribal lands should provide fact-specific support demonstrating that the carrier is not subject to the state commission’s jurisdiction for the

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<sup>31</sup> See <http://www.tracfone.com/howitworks.jsp?nextPage=howitworks.jsp&task=howitworks>.

<sup>32</sup> See, North Carolina Petition, p. 1; Alabama Petition, p. 1.

<sup>33</sup> See, in general, In the Matters of Federal-State Joint Board Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Western Wireless Corporation, Crow Reservation in Montana, Smith Bagley, Inc., Cheyenne River Sioux Tribe Telephone Authority, Western Wireless Corporation, Wyoming, Cellco Partnership d/b/a/ Bell Atlantic Mobile, Inc., Petitions for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service, *Twelfth Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, FCC 00-208, CC Docket No. 96-45 (rel. June 20, 2000) (Twelfth Report & Order).

provision of service on tribal lands.”<sup>34</sup> The FCC emphasized, “this is a strict burden and that generalized assertions regarding the state commission’s lack of jurisdiction will not suffice.”<sup>35</sup>

TracFone, while it provides a letter from the Alabama Public Service Commission stating “the jurisdiction of the APSC does not extend to providers of cellular services...”,<sup>36</sup> and an Order from the State of North Carolina Utilities Commission stating that it “lacks jurisdiction to designate ETC status for CMRS carriers”<sup>37</sup> provides not even one fact demonstrating that either state has no jurisdiction over it when it provisions services on tribal lands. TracFone does not even attempt to assert that either state commission lacks jurisdiction on tribal lands. As neither the letter from the Alabama Public Service Commission nor the Order from North Carolina Utilities Commission do not discuss the states’ jurisdiction over tribal lands or any carrier, let alone TracFone, serving tribal lands, they are insufficient to meet TracFone’s burden under Section 214(e)(6) of the Telecommunications Act of 1996. TracFone’s Petitions for North Carolina and Alabama fail in this respect.

#### **IV. The FCC Should Deny TracFone’s Petition for Forebearance and its requests for ETC Designation.**

TracFone has utterly failed in providing to this Commission and the American public *any evidence* of why it is in the public interest to forebear from applying Section 214 and grant it ETC status. As Chairman Powell noted, “the Commission cannot do just *anything*, no matter how well-intended or politically-appealing. We must take action based on an adequate record and a thorough and logical examination of what that record does and *does not* tell us.”<sup>38</sup>

By providing conflicting sworn statements regarding the type of federal support it is seeking, requesting the Commission grant its Petitions now with the details to be provided later and attempting two end-runs around the Commission’s rules, TracFone has done nothing but

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<sup>34</sup> Twelfth Report & Order, para. 122.

<sup>35</sup> Ibid.

<sup>36</sup> Alabama Petition, Exhibit 2.

<sup>37</sup> North Carolina Petition, Exhibit 2.

<sup>38</sup> Twelfth Report and Order, *Separate Statement of Commissioner Michael Powell, Approving in Part and Dissenting in Part*, p. 1 (emphasis in original).



obfuscate the record upon which the Commission must make its determination; a record, that by this Commission's Order, is to be populated with facts provided by the applicant. Until TracFone meets its burden of proof and an adequate record is established, the Commission cannot and must not grant either the Petition for Forebearance or any of the Petitions for ETC Designation.

Respectfully submitted,

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